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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 603

GEORGE H. BEILFUSS,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

ROBERT W. KENNY,
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FRANK RICHARDS,
Deputy,
Counsel for Appellee.

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The People of the State of California, appellee, respectfully present the following matters making against the jurisdiction of this honorable court asserted by appellant:

Statement of Case.

An information was filed in the Superior Court of the State of California, in and for the County of Los Angeles, charging appellant with 12 counts of grand theft. He was convicted on all 12 counts but granted a new trial on Counts II, VI and XI, which were then dismissed. He appealed the convictions to the District Court of Appeal, Second Appellate District, of the State of California, which affirmed the conviction on certain counts and reversed as to others. The Supreme Court of California denied a hearing (59 A. C. A. 97, 138 Pac. (2d) 332).

Jurisdiction.

The portion of the decision of the District Court of Appeal of the State of California to which appellant makes objections and upon which he predicates his claim of federal jurisdiction is as follows:

> "It appears from a showing made by defendant in the trial court that at the time of his original arrest on the charges involved in this case he was taken from his office, where the arrest was made, and that an investigator from the district attorney's office, who accompanied the arresting officer, but had no search warrant, remained behind after defendant's removal, searched through defendant's papers and removed a part of them. Defendant then began in the Los Angeles Municipal Court an action against the district attorney to recover possession of these papers obtained a speedy trial of that action, and at the commencement of the trial of the case at bar had just received word that the municipal court case had been decided against him, but no judgment had then been entered. He then made a motion for a continuance of the trial of this criminal case to enable him to appeal from the judgment in the municipal court case and have the appeal heard, in the hope of obtaining a reversal of the then as yet unentered judgment. Defendant also presented a petition to the trial court in this case for the return to him of the papers so taken from him, which was denied, the court rejecting his offer to prove the facts above stated. When such papers were offered in evidence he objected to them on the ground that they had been obtained by an unlawful search and seizure, but his objection was overruled and they were received in evidence. His argument here on these matters amounts to a request that we overrule or ignore the decision in *People* v. *Mayen*, 1922, 188 Cal. 237 (205 P. 435, 24 A. L. R. 1383), where it was held that upon an offer of evidence the court will not inquire into the manner in which that evidence was obtained or exclude it because it was obtained by means of an unlawful search and seizure,

and that, while the defendant in such a case has a right to recover possession of papers wrongfully taken, his proceedings to do so are no proper part of the trial of the criminal case against him and the decision thereon cannot be reviewed on appeal from the judgment in the criminal case. This decision was considered and reaffirmed in *People* v. *Gonzales* (1942), 20 Cal. 2d 165, 168 (124 P. 2d 44), and is immune from attack in this court. Neither of these cases dealt with a motion for a continuance, such as we have here, but we think that, on the showing here made, the court did not abuse its discretion in denying the motion."

Appellant assigns said holding as error, in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States. In his statement of jurisdiction he hinges the matter on two propositions: (1) whether the principles enunciated by this honorable court under the Fourth and Fifth Amendments are equally applicable to courts of the states under the Fourteenth Amendment, and (2) whether the use in evidence of the books, papers and effects taken from appellant's office without a search warrant so fatally "infects" the fairness of the trial as to constitute a violation of the due process of law guaranteed by the Fourteenth Amendment.

The principles enunciated by this court are that unreasonable search and seizure is prohibited by the Fourth Amendment and that the use in evidence in a criminal prosecution in the federal courts of papers and effects obtained by federal agents in violation of the Fourth Amendment is to compel the defendant to become a witness against himself in violation of the Fifth Amendment. (See *Gouled* v. *United States*, 255 U. S. 298, 41 S. Ct. 261, and authorities there cited.)

This court has heretofore been called upon to apply these principles to prosecutions in the state courts under

the Fourteenth Amendment, not only as to abridgement of privileges and immunities of citizens of the United States, but also as to the due process clause. The court refused to extend the principles above stated to include trials in the state courts. (*Twining* v. *New Jersey*, 211 U. S. 78.) In that case, which arose out of a conviction in a court of the State of New Jersey, this honorable court stated (page 99) "that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgement by the States," and in passing upon the question of whether or not it was a denial of due process of law, said: (page 113)

> "• • • There seems to be no reason whatever however, for straining the meaning of due process of law to include this privilege within it, because, perhaps we may think it of great value. The states had guarded the privilege to the satisfaction of their own people up to the adoption of the 14th Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened, by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that state made the same ruling. *State* v. *Bartlett*, 55 Me. 200; *State* v. *Lawrence*, 57 Me. 574; *State* v. *Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *State* v. *Banks*, 78 Me. 492, 7 Atl. 269; Rev. Stat. chap. 135, sec. 19.
>
> "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privileges against self-incrimination. We do not intend, however, to lend any countenance to the

truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Queen* v. *Rhodes* (1899) 1 Q. B. 77; *Ex parte Kops* (1894) A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."

In *Weeks* v. *United States*, 232 U. S. 383, 34 S. Ct. 341, 346, this court said:

"• • • As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies."

One of the authorities cited by the court in support of the above language is *Twining* v. *New Jersey, supra.*

The provision in the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" was before the court for consideration as to its inclusion in the Fourteenth Amendment in the case of *Palko* v. *State of Connecticut*, 302 U. S. 218, 58 S. Ct. 148, 150. The argument was there advanced that whatever was forbidden by the Fifth Amendment was forbidden by the Fourteenth also. In answer to

this argument the court stated that there was no such general rule, for it has been held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer, and that the exemption (no person shall be compelled in any criminal case to be a witness against himself) will fail if the State elects to end it, citing among other authorities for the latter statement, *Twining* v. *New Jersey*, *supra*.

As to appellant's second proposition, namely, whether the use in evidence of the books, papers and effects taken from his office without a search warrant so fatally "infects" the fairness of the trial az to constitute a violation of the due process of law guaranteed by the Fourteenth Amendment, is answered, we think, by the language of this court in *Snyder* v. *Commonwealth of Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, where it was claimed that the due process clause of the Fourteenth Amendment was violated by the trial court's refusal to permit the accused to be present at the scene of the crime while it was being viewed by the jury. The court said (p. 332):

> "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing authorities, among which is *Twining v. New Jersey*.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

Other pertinent language in that case is the following (p. 338):

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

"The Constitution and statutes and judicial decisions of the commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (citing authority), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In *People* v. *Gonzales*, 20 Cal. (2d) 165, 124 Pac. (2d) 44, the Supreme Court of California, in passing upon the matter now under discussion, cited many authorities rendered by this honorable court and other courts of the nation. We shall quote only a small part of the opinion.

"• • • While the United States Supreme Court has held that the due process clause includes the guar-

antee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (citing authorities), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Citing authorities.) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Citing authorities.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (Citing authority.)"

In *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252, this court held that even the denial of counsel to a defendant did not result in all cases in a violation of the Fourteenth Amendment. We quote the concluding paragraph of the opinion, as follows (p. 1262):

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

From the foregoing authorities it is obvious that the removal of books, papers and effects from the office of appellant, without a search warrant, did not constitute a viola-

tion of the due process clause of the Fourteenth Amendment, and that their use in evidence against appellant did not result in a conviction lacking in fundamental fairness. This is made more apparent when the circumstances under which they were taken are considered. The decision of the District Court of Appeal of the State of California shows that the search and seizure was made contemporaneously with or as an incident of the lawful arrest of appellant.

In *Agnello* v. *United States*, 269 U. S. 20, 46 S. Ct. 4, 5, this court said:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. (Citing authorities.)"

In *United States* v. *Lee*, 274 U. S. 559, 47 S. Ct. 746, 748, it is said:

> "Moreover search, if any, of the motorboat at sea did not violate the Constitution, for it was made by the boatswain as an incident of a lawful arrest." (Citing *Agnello* v. *United States*, supra.)

Conclusion.

It is to be noted that no statute of the State of California is drawn in question by the appeal herein, but only a final decision of a court which it is asserted deprives appellant of a right, privilege and immunity specially set up and claimed by him under the Constitution of the United States. Therefore the appeal was improperly taken. The papers on which the appeal was allowed may, however, be treated as a petition for writ of certiorari. (*Memphis*

Natural Gas Company v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 860.)

Appellee moves that the appeal be dismissed, and that petition for writ of certiorari, if the papers are so treated, be denied for want of a substantial federal question.

Respectfully submitted,

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